DOCUMENT RESUME

ED 287 163 CS 210 645

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TITLE Some Initial Thoughts on Salinger v. Random House.
PUB DATE Aug 87
NOTE 24p.; Paper presented at the Annual Meeting of the Association for Education in Journalism and Mass Communication (70th, San Antonio, TX, August 1-4, 1987).
PUB TYPE Speeches/Conference Papers (150)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS Authors; Biographies; *Copyrights; *Court Litigation; Freedom of Speech; Government Role; *Intellectual Property; Legal Problems; *Publishing Industry
IDENTIFIERS *Copyright Act 1976; First Amendment; *Salinger v Random House

ABSTRACT

The legal action brought by author J. D. Salinger against Random House Publishers to prevent certain letters--now the property of various university libraries--from being published in a biography illustrates how the long-standing accommodation between the Copyright Act and the First Amendment can occasionally break down. Although the biographer mostly paraphrased passages of the letters, Salinger has since copyrighted the letters and the court has issued an injunction against their use. In such a case, a problem exists between the writer's right to disseminate information useful to the public and the original "owner" of the information to profit from later publication of the information. Several possibilities for resolving this problem exist. Use of the idea/expression dichotomy or the fair use defense is inadequate because it is difficult to draw the line between idea and expression, and sometimes use of the original expression is necessary; and the fair use analysis inadequately protects free speech interests. A more reasonable approach consists of a limited First Amendment defense for copyright actions and damages determined by the court commensurate with copyright interests. Because it can be tailored to specific case situations it can accommodate the need for more protection for First Amendment values without excessively damaging the copyright interests at stake. (JC)

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SOME INITIAL THOUGHTS ON SALINGER V. RANDOM HOUSE

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SOME INITIAL THOUGHTS ON SALINGER V. RANDOM HOUSE

In his dissent in *Harper & Row v. Nation Enterprises*, Justice Brennan argued that the Supreme Court's "exceedingly narrow definition" of the copyright infringement defense of fair use would "stifle the broad dissemination of ideas and information copyright is intended to nurture."[1] The recent decision of the court of appeals in *Salinger v. Random House*[2] indicates that his concern was justified and that the *Harper & Row* construction of fair use as interpreted by the Second Circuit does not provide adequate protection for First Amendment values. A specific First Amendment defense for copyright infringement actions is therefore needed.

I.

In his 1984 treatise on the First Amendment[3], Professor Melville Nimmer observed:

> The First Amendment tells us that "Congress shall make no law . . . abridging the freedom of speech, or of the press." Does not the Copyright Act fly directly in the face of that command? Is it not precisely a "law" made by Congress which abridges the "freedom of speech" and "of the press" in that it punishes expressions by speech and press when such expressions consist of the unauthorized use of material protected by copyright.[4]

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1. 11 Med.L.Rptr. 1969, 1983 (1985).

2. 13 Med.L.Rptr. 1954 (2d Cir. 1987).

3. Nimmer on Freedom of Speech, Matthew Bender, New York, N.Y., 1984.

4. *Id* at 2-56.

Nimmer went on to conclude that the First Amendment and the Copyright Act are not in fact contradictory. In his opinion, the copyright distinction between an idea (or fact) and the expression of an idea allows both to peacefully coexist. Because copyright only protects the expression of an idea, copyright does not in his view seriously limit the dissemination of news and ideas. At the same time it gives adequate protection to the creators of literary and artistic work product.[5]

The courts have echoed this view. In *Harper & Row* the Supreme Court gave express approval to Nimmer's notion that First Amendment values are adequately protected by the idea/expression distinction.

> [C]opyright's idea/expression dichotomy "strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression." . . . (Copyright laws are not restrictions on freedom of speech as copyright protects only form of expression and not the ideas expressed).[6]

Where the idea/expression dichotomy does not adequately serve First Amendment values some additional protection can be found in the nonconstitutional defense of fair use. Fair use protects the reproduction of copyrighted works where the copying is of benefit to the public and not likely to harm the value of the copyrighted work. Originating in the common law, the defense was codified in § 107 of the Copyright Act of 1976.[7] Section 107

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5. *Id.*

6. Note 1, *supra*, at 1977.

7. 47 U.S.C. § 107.

lists four specific factors that must be considered in assessing a claim of fair use.

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
>
> (2) the nature of the copyrighted work;
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> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

Fair use has in the past proved effective in promoting First Amendment values. For example, in *Time, Inc. v. Bernard Geis Associates*,[8] the use of frames from the Zapruder film of the Kennedy assassination in a book on the assassination was held to be a fair use.

II.

However, despite occasional successes such as the Geis case, fair use has some serious limitations as a means of protection for First Amendment values. *Harper & Row*, is a good example of the limitations of the fair use defense in a "news" context. Harper & Row had contracted for various exclusive rights to President Gerald Ford's memoirs, *A Time to Heal*, including the right to license prepublication excerpts. Harper & Row had then granted *Time* the right to excerpt 7,500 words from President Ford's account of his decision to pardon President Nixon in return for $25,000 (half in advance), such publication to take place one week before the publication of the book. Prior to

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8. 293 F.Supp. 130 (S.D.N.Y. 1968).

Time's scheduled publication, Victor Nevasky, editor of *The Nation*, obtained an unauthorized copy of *A Time to Heal*. Working directly from the manuscript, he produced a 2,250 word article consisting exclusively of quotes, paraphrases and facts drawn from the Ford manuscript. His article appeared before the scheduled publication of the *Time* article. As a result *Time* did not publish its article and refused to pay Harper & Row the remaining $12,500.

In the ensuing copyright action, *The Nation* relied on fair use and the First Amendment to defend its actions. In a 6-3 decision the Court held that *The Nation*'s excerpt was not a fair use. In applying the four factors of fair use, the Court first held that the general purpose was indeed news reporting, but that the more specific purpose was to supplant "the copyright holder's commercially valuable right of first publication."[9]

In examining the nature of the copyrighted work, Justice O'Connor, writing for the Court acknowledged that it was a factual work and that the need to disseminate factual works is greater than that for fictional works. Having done so, however, the Court then focused on the unpublished nature of the work and decided that fair use has extremely limited application to unpublished works.[10]

A key issue was the amount and substantiality of the portion used. Here, although there was some dispute as to exactly how

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9. Note 1, *supra*, at 1979.

10. *Id* at 1980.

much of *The Nation*'s article consisted of infringing material, it was clear that overall it was a very small amount when compared to the entire text of *A Time to Heal*. The Court, however, viewed this as a qualitative as well as a quantitative issue, and found that the material on the Nixon pardon was the heart of the book and that the quotes used in *The Nation*'s article were the essence of that article. In that sense the portion used was substantial.[11]

For the Court, the easiest part of the test was the effect on the market for the copyrighted work. Harper & Row had lost $12,500 when *Time* cancelled its projected article as a result of *The Nation*'s article. When considered in conjunction with the analysis of the other three factors, the finding against fair use was clear.[12]

Justice Brennan wrote a sharp dissent accusing the majority of extending copyright protection to information and ideas. In his view the purpose of the work -- news reporting -- and the nature of the copyrighted work -- historical and factual-- supported a fair use defense. He found the amount taken not to be excessive even though it dealt with the most important part of the book. Because he believed that the cancellation by *Time* was as much a result of information contained in *The Nation*'s article as expression appropriated from Ford's book, he did not find that

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11. *Id* at 1980-81.

12. *Id* at 1981-1983.

the infringement had any serious effect on the market for the copyrighted material.[13]

The limitations of fair use as a vehicle for First Amendment protection have become even more apparent with the recent decision by the court of appeals in *Salinger*. Author J.D. Salinger sought to restrain the publication of a biography of him on the grounds that it contained excerpts from copyrighted letters that he had written. The biographer, Ian Hamilton had obtained copies of the letters from various college libraries to which they had been donated by their recipients. As in *Harper & Row* the case was treated strictly as a copyright case with no real First Amendment issues. For both the district court and the court of appeals, the key question was whether or not the use of the excerpts from the letters constituted fair use. In the district court, Judge Leval found that the excerpts were covered by fair use.[14] On appeal, his decision was overturned and a preliminary injunction prohibiting publication of the biography was issued.

Judge Newman, writing for the court of appeals[15], relied heavily on *Harper & Row* for his fair use analysis because it was

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13. *Id* at 1983-1995.

14. *Salinger v. Random House*, 13 Med.L.Rptr. 1689 (S.D.N.Y. 1986).

15. Note 2, *supra*. The case was argued before a three-judge panel. However, prior to the court's reaching a decision, JUdge Mansfield died. The appeal was decided by the remaining two judges, Newman and Miner, pursuant to Local Rule § 0.14(b).

"the court's first delineation of the scope of fair use *as applied to unpublished works* (emphasis added)."[16]

In considering the application of the four fair use factors to Hamilton's use of the Salinger letters, the court started by categorizing the purpose of the use alternatively as "criticism," "scholarship," or "research."[17] All of these categories are viewed as appropriate to a fair use. The court went on, however, to specifically reject Judge Leval's assertion that a biographer is entitled to an especially generous application of the defense.[18] Judge Leval had argued that this was necessary because of the special dilemma faced by a biographer.

> To the extent he quotes (or closely paraphrases), he risks a finding of infringement and an injunction effectively destroying his biographical work. To the extent he departs from the words of the letters, he distorts, sacrificing both accuracy and vividness of description.[19]

The court of appeals dismissed Judge Leval's argument by noting that as long as the biographer took only the factual content of the letter, there was no copyright problem.[20] The court did not recognize any need to take the expression contained in the letter.

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16. Note 2, *supra*, at 1957.

17. *Id* at 1957.

18. *Id* at 1958.

19. Note 14, *supra*, at 1696.

20. Note 2, *supra*, at 1958.

Turning to the second factor, the court, as noted above, focused on the unpublished nature of the work as being of critical importance. In essence, the court viewed it as creating a heavy presumption against a finding of fair use.

The court also disagreed strongly with Judge Leval's analysis of the amount and substantiality of the portion used. Much of the disagreement centered around paraphrased passages. Whereas Judge Leval had found fewer than 30 instances where copyrighted expression was used, the court of appeals found that copyrighted expression was used on at least 40% of the book's 192 pages.[21]

Finally, the court found that due to the substantial amount taken by Hamilton and his extensive use of the phrases "he wrote" and "he said" that at least some members of the public might be misled into believing that they had read the essence of Salinger's letters, thus reducing the potential market for a book of his letters. This led the court of appeals to conclude that the fourth fair use factor, effect on the potential market for the work, weighed slightly in Salinger's favor.

III.

In both these cases the traditional methods of balancing the competing copyright and speech interests -- the idea/expression dichotomy and the fair use defense -- appear to be inadequate to protect the speech interest at stake. Both are difficult to

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21. *Id* at 1959-1960.

apply, susceptible to widely varying interpretation and strongly weighted against free speech interests.

The idea/expression dichotomy as applied in these cases suffers from two basic flaws. The first is that it is very difficult to draw a line between an idea and the expression of that idea. In *Salinger* Judge Leval and Judge Newman reached radically different conclusions as to how much of Salinger's copyrighted expression was reproduced in Hamilton's biography. In *Harper & Row*, Justice O'Connor admitted that "[e]specially in the realm of factual narrative, the law is currently unsettled regarding the ways in which uncopyrightable elements combine with the author's original contributions to form protected expression."[22]

The second major problem with the idea/expression dichotomy is that it fails to recognize that sometimes the expression is itself news. Attempts to describe the information contained in the original work without appropriating the expression itself are simply inadequate.[23] Thus, in his biography of Salinger,

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22. Note 1, *supra*, at 1973.

23. Professor Nimmer recognizes a similar problem in the area of graphic or pictorial works arguing the distinction may not adequately protect the First Amendment interests at stake. He gives the specific example of the photographs of the My Lai massacre.

> Here is an instance where the visual impact of a graphic work made a unique contribution to an enlightened democratic dialogue. No amount of words describing the "idea" of the massacre could substitute for the public insight gained through the photographs. The photographic expression, not merely the idea, became essential if the public was to fully understand what occurred in that tragic episode. It would be

Hamilton paraphrased Salinger's comment that Wendell Wilkie "looks to me like a guy who makes his wife keep a scrapbook for him" to say that Wilkie was "the sort of fellow who makes his wife keep an album of his press cuttings."[24] Judge Newman argued that Hamilton should simply have stated that Salinger found Wilkie vain despite Hamilton's wish to avoid a "pedestrian" way of expressing it. "But when dealing with copyrighted expression, a biographer (or any other copier) may frequently have to content himself with reporting only the fact of what his subject did, even if he thereby pens a 'pedestrian' sentence."[25]

What Judge Newman failed to recognize is that where one is writing the biography of someone noted for literary expression, reporting only the facts contained in the expression is not merely pedestrian, it is incomplete. It is the expression that allows the reader to gain an understanding of the subject of the biography. To a lesser degree the same is true of other public or newsworthy figures. For example, reporting that Richard Nixon claimed not to have engaged in criminal activity is not the same as reporting that Nixon said, "I am not a crook."

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intolerable if the public's comprehension of the full meaning of My Lai would be censored by the copyright owner of the photographs. Here it would seem that the speech interest outweighs the copyright interest. (Note 3, *supra*, at 2-74.)

24. Note 2, *supra*, at 1958.

25. *Id* at 1958.

The fair use analysis used by the majority in *Harper & Row* is also inadequate to protect free speech interests. The Court created a heavy presumption against fair use for unpublished works. Yet it would seem that the copying and dissemination of portions of these works would make the greatest contribution to the marketplace of ideas. With a published work the material is already available to the public. With an unpublished work it is not.

Similarly, the Court's declaration that the amount taken must be analyzed from a qualitative as well as a quantitative standpoint also lessens the likelihood that reproduction for news purposes will be declared a fair use, because it is the "heart of the work" that is always the most newsworthy.

Finally, the failure to take into account First Amendment values allows the courts to treat extremely dissimilar cases as essentially the same. *Harper & Row* may appear to the court of appeals to be the same as *Salinger*, but in fact the two are very different when examined from a First Amendment perspective.

In *Harper & Row* the question was not whether the Ford manuscript would be made available to the public, but rather who would disseminate it and when. Essentially, it boiled down to who would profit from the manuscript. Although one can argue that *The Nation's* audience differed from that of *Time* magazine, and thus, *The Nation's* separate publication furthered some limited First Amendment purpose, it is clear that the primary

issue was one of profit. This issue is well-suited to the application of traditional copyright law and fair use analysis.

In contrast, the real issue in *Salinger* is whether or not certain information, the excerpts from his letters, will be disseminated to the public. Although there was testimony as to the worth of Salinger's letters, it seems clear that the real purpose of seeking the injunction was to prevent dissemination as opposed to protect market value. For the Second Circuit the purpose of seeking the injunction was irrelevant. There was no real concern that the effect of allowing the injunction would be to prevent general public access to the letters.

> Public awareness of the expressive content of the letters will have to await either Salinger's decision to publish or the expiration of his copyright, save for such special circumstances as might fall within the "narrower" scope of fair use available for unpublished works.[26]

The Second Circuit's attitude as expressed demonstrates an appalling insensitivity to First Amendment values. As the Supreme Court has expressly recognized the time element in news is an important one. The decision when to publish is just as much a part of the editorial process as the decision what to publish.[27]

The contrast between the two cases was sharpened by the difference in the remedies sought. In *Harper & Row*, the issue was strictly damages. In *Salinger* an injunction was requested

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26. See Note 2, *supra*, at 1961.

27. See, e.g., *Nebraska Press Association v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976).

and issued. In copyright law there is no major distinction made between these remedies. Under the First Amendment, however, there is a major distinction. An injunction is a prior restraint, carrying with it a heavy presumption against its issuance.[28] Yet when issued in the context of a copyright infringement action, there is no additional burden placed on the party seeking the injunction.

Apparently, the courts have taken the position that because copyright is generally not subject to First Amendment challenge there is no need to examine any copyright case for First Amendment problems. However, the rationale given for holding the general balance between the two to be a proper accommodation of the competing values shows that it is inappropriate when applied to the facts of *Salinger*.

In *Harper & Row*, Justice O'Connor stated the basic rationale for this balance.

> In our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.[29]

That rationale does indeed appear applicable to the facts of *Harper & Row*. It seems reasonable to assume that if there were

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28. See *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed.2d 1357 (1931); *New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971); *Nebraska Press Association v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976).

29. Note 1, *supra*, at 1978.

no protection for his manuscript and thus no economic incentive, President Ford might well have decided that it was not worth the effort to write it. If that were the case the public would have been deprived of access to a key viewpoint on an important period of this country's history.

There is, however, a second interest that underlies copyright protection, privacy. This second interest is by its very nature primarily concerned with unpublished works. In contrast to the economic incentive rationale, the privacy rationale does not appear to further First Amendment values.[30] *Salinger* provides an excellent example of the privacy rationale of copyright. It is unlikely that Salinger wrote his letters because he expected to profit economically from them or that at the time he wrote them he knew they would have any value. Evidence of this is the fact he did not even bother to register his copyright in them until he found out about the excerpts contained in the biography.

Here the balance between copyright and the First Amendment is tipped heavily in favor of the copyright interest. Absent a reversal of the court of appeals decision the public will be deprived of an insight into one of the major authors of the 20th century.

IV.

If, as *Salinger* indicates, there are situations where traditional copyright law does not adequately accommodate

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30. Nimmer at 2-62.

competing First Amendment interests, what can be done to remedy the apparent imbalance? Possibilities include modifying the idea/expression dichotomy, restructuring the fair use defense and establishing a First Amendment defense for copyright infringement actions. Each has its own pluses and minuses.

Modifying the idea/expression dichotomy to recognize that some expression is news and, as such, necessary to properly communicate the idea, would help the biographer's dilemma suggested by Judge Leval. Literary expression judged to be news would, like ideas and facts, be outside the ambit of copyright protection.

The problem with modifying the idea/expression dichotomy is that it creates more problems than it solves by swinging the balance between copyright interests and First Amendment interests too far in the other direction. Any expression removed from copyright under the revised analysis would have no protection whatsoever. It could easily be exploited for purely economic gain. It would allow copying where there was no First Amendment value being served. Such uses might in the long term actually threaten First Amendment values by reducing the economic incentive for authors. Overall, more harm than good would result.

A second possible approach is to modify the fair use defense. As previously discussed, fair use has been used to protect First Amendment values.[31] However, because fair use

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31. Note 8, *supra*, and accompanying text.

focuses on the economic consequences of copying a protected work,[32] it is not well suited to situations where privacy is the underlying basis for the copyright claim.

In his opinion Judge Leval attempted to include First Amendment values in the fair use balancing process by focusing on the nature of Hamilton's work.

> The biographical purpose of Hamilton's book and of the adopted passages are quite distinct from the interests protected by Salinger's copyright. Finally, although both Hamilton and Random House no doubt hope to realize profit from the sales of the book, it is a serious, carefully researched biography of an important literary figure (of whom little is known); its publication is of social and educational value.[33]

Perhaps, if other judges could be persuaded to adopt Judge Leval's approach fair use could be used to reach a proper accommodation between copyright and the First Amendment. However, given the long string of precedents treating marketability as the most important factor and focusing on the economic issues, the Second Circuit's approach will more likely predominate. Further, because Judge Leval was overruled by the Second Circuit, only a Supreme Court reversal or an amendment of § 107 by Congress could institute the Leval approach.[34]

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32. As the Court notes in *Harper & Row*, the effect on the market" is undoubtedly the single most important element of fair use." Note 1, *supra*, at 1981.

33. See Note 14, *supra*, at 1695.

34. This is especially true due to the dominant position of the Second Circuit in the area of copyright law. Because so many publishing houses are located in New York City, the Second Circuit has always decided a disproportionate number of the country's copyright cases.

Still another approach would be to establish a First Amendment defense for copyright infringement cases similar to that suggested by Professor Nimmer for news photographs.[35] His proposed news photograph defense would operate as follows.

> If within one month of the making of the "news photograph" it has not appeared in the newspapers, magazines, or television news programs servicing a given area, then anyone may reproduce the photographs in such area with no obligation other than to pay to the copyright owner of the photograph what the court may determine to equal a reasonable royalty.[36]

In essence, Professor Nimmer's proposal would establish a limited compulsory license for news photographs.[37]

Could such a proposal be applied to literary expression when used in a biographical or scholarly works? Possibly, although there is a major difference between news photographs and literary expression. Using a news photograph is an all or none situation. You can't select portions of a news photograph the way you can with a letter or other written work. Also, the market value of news photographs is usually limited to a short time frame and a specific use -- news. Literary expression is more likely to hold its value over time and the real value may be totally unrelated to its news value.

As a result establishing a proper time frame for invoking the compulsory license would be difficult as would be determining

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35. NIMMER at 2-76. See, also, Note 23, *supra*.

36. *Id*.

37. Examples of compulsory licenses currently mandated by the Copyright Act can be found in 47 U.S.C. §§ 111(d) and 115.

the amount of the reasonable royalty. Nevertheless, the idea of a First Amendment defense does have some appeal.

Perhaps an even better approach is suggested by Professor Nimmer's proposal for the implementation of the First Amendment defense for news photographs. He argued that "a court might find that in the narrow area of 'news photographs,' the First Amendment precludes application of those remedies under the Copyright Act relating to infringer's profits, statutory damages, injunctive relief, and impounding and destruction of negatives and prints (footnotes omitted)."[38] Eliminating these remedies would leave actual damages which the court could interpret as a reasonable royalty.

What Nimmer's suggestion does is focus on the remedy. By examining the remedies sought and the degree to which they impinge on the First Amendment values, courts might well be able to reach a proper accommodation between copyright values and First Amendment values. Thus, an injunction would be the most difficult to obtain because of the heavy presumption against prior restraint. Similarly, destruction of infringing materials would be difficult to obtain because it would remove those materials from the marketplace of ideas.

Various damage awards could be evaluated according to the likelihood that they would chill the infringing use. Damages equal to or exceeding the total profit that would be realized from the infringing work would be highly suspect. Damages

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38. *Id.*

approaching a reasonable royalty would be most likely to pass muster under this approach. Where no real harm to the original work has resulted, it should be reflected in the award.

Clearly such a defense should not apply to all uses or all works. If someone takes a work of fiction, already published and widely available, reprints it in its entirety and sells it in direct competition with the copyright holder, there is no apparent First Amendment value served by limiting the remedies available to the copyright holder. Outright theft of intellectual property, solely for commercial gain should not be condoned or protected.

On what basis could a determination of the appropriateness of a First Amendment defense be made? One possibility would be a modified version of fair use focusing on the first three factors enumerated in § 107.

The first factor, the nature of the use, would focus on the First Amendment value being served by the use. Thus, scholarly and biographical uses would have the most success asserting the defense. However, it could also be available to commercial news services in certain situations.

As far as the nature of the copyrighted work is concerned, the key would be the news, facts or ideas contained in the work. Generally, the defense would be limited to factual works. However, a limited application to fictional works might be possible, especially where the expression of the copyrighted work's author could somehow be considered "news".

The question of how to treat unpublished works presents a more serious problem. As the Court in *Harper & Row* correctly noted, the right of first publication is one of the more important rights granted by the Copyright Act. On the other hand, because they are unavailable to the public, the First Amendment interest served by allowing someone else to publish them is also strong.

Perhaps, the best way to deal with unpublished works is to focus on the underlying reason for the lack of publication. Often a work is unpublished because the author is not yet satisfied with it. Publication is likely to occur after further revision of the work. In such cases, the First Amendment interest is not well served by permitting premature publication. As the Court observed in *Harper & Row*, "[t]he obvious benefit to author and public alike of assuring authors the leisure to develop their ideas free from fear of expropriation outweighs any short term 'news value' to be gained from premature publication of the author's expression."[39]

If, on the other hand, a desire for privacy is the reason for lack of publication a different analysis obtains. There is no argument that protecting the work in its current form will ultimately produce a better work. Rather, protecting it only serves a desire to prevent dissemination of the information. Whatever the benefit to the author, it is hard to argue that the public is benefitted in these circumstances. The justification

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39. Note 1, *supra*, at 1976.

for allowing a First Amendment defense for copyright infringement is thus much stronger when a desire for privacy is the reason the work is unpublished.[40]

The third factor, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, would have to be limited to a quantitative analysis. The greater the portion of the copyrighted work taken, the less the likelihood of a successful First Amendment defense. As previously discussed, the qualitative test used by the Court in *Harper & Row* is weighted too heavily against the speech interest involved.

The final fair use factor, the effect on the potential market, would not be needed to determine the applicability of the defense because, unlike fair use, the proposed First Amendment defense is not an all or none proposition. Rather it tailors the damages to reach a proper accommodation between the copyright and First Amendment interests at stake in the specific case. Thus, if the infringing use caused serious harm to the market for the copyrighted work, then a higher damage award would be appropriate.

To briefly summarize, the proposed First Amendment defense would operate as follows. A court first determines whether the

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40. It is interesting to note that when the Court in *Harper & Row* discussed the privacy rationale for unpublished works it cited Brandeis & Warren, The Right To Privacy, 4 Harv. L. Rev. 193 (1890), a work generally acknowledged as the basis for the tort of invasion of privacy. Note 1, *supra*, at 1976. Newsworthiness has long been recognized as a defense to at least some branches of the invasion of privacy tort.

infringing work qualifies for the defense by applying the modified fair use analysis described above. If a work qualifies the court then evaluates possible remedies for infringement in terms of First Amendment principles.

V.

The Second Circuit's decision in *Salinger v. Random House* illustrates how the long-standing accommodation of the sometimes competing interests embodied in the Copyright Act and the First Amendment occasionally breaks down. In those situations where the idea/expression dichotomy and the non-constitutional defense of fair use do not adequately protect the First Amendment interests at stake a limited First Amendment defense for copyright actions is needed. Because it can be tailored to specific case situations it can accommodate the need for more protection for First Amendment values without excessively damaging the copyright interests at stake.